3 Two Square Sdn Bhd v Perbadanan Pengurusan 3 Two Square and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(IM)(NCVC)-530–03 OF 2017, B-02(NCVC)(W)-2149–10 OF 2017 AND B-02(NCVC)(W)-2155–10 OF 2017
ZALEHA YUSOF, LAU BEE LAN AND AZIZAH NAWAWI JJCA
5 JANUARY 2021

Civil Procedure — Appeal — Decision of trial judge — Whether trial judge's decision was substantially in error and warranted appellate interference

The three appeals herein between 3 Two Square Sdn Bhd ('the developer') and the management corporation ('MC') of the commercial development known as 3 Two Square ('3TS') emanated from the decisions of the High Court in three consolidated civil suits between the parties, namely, 'Suit 510', 'Suit 516' and 'Suit 125'. Following completion of the development of 3TS, the developer maintained and managed 3TS until the Joint Management Body ('JMB') for the development complex was formed on 2 August 2008. Thereafter, the MC took over the maintenance and management of the complex from the JMB on 8 April 2009. In July 2012, the MC terminated the developer's self-appointed role as managing agent of 3TS for which it was paid RM20,000 per month since 2 August 2008. The developer owned 13 shop lots in 3TS, all the office lots in Corporate Tower Block F and all the car parks in 3TS which had been accessorised to a penthouse unit that it owned in Block F. At all material times, the developer ran a car park business in 3TS and its car park management office had occupied the common property owned by the MC. Following its take-over of the maintenance and management of 3TS, the MC filed three suits against the developer. In Suit 510, the MC sought the refund of a total of RM1.2m in management fees that was paid to the developer at the rate of RM20,000 per month for the years 2008–2012. In Suit 516, the MC sought payment of RM1,739,712 as management fees and sinking fund charges for the car parks owned by the developer which were accessorised to its penthouse unit. In response to that claim, the developer counterclaimed for the refund of RM432,853.86 as maintenance and sinking fund charges for the said car park parcels. The developer also sought a refund of utility charges (for a chiller) that it had paid on parcels it owned in Block F. In Suit 125, the MC sued the developer for vacant possession and rent (including double rental) in respect of the developer's parking business office that had occupied the MC's common property. The trial judge: (a) dismissed the developer's application to disqualify the MC's solicitor from further acting for the MC in the proceedings (the appeal against this decision was the subject of Appeal No 530 herein); (b) found that the developer had illegally appointed itself as managing agent of

3TS to collect management and sinking fund charges; (c) held that the MC was not entitled to sue the developer for refund of management fees it had collected before the date of the MC's incorporation on 8 April 2009; (d) dismissed the MC's RM1,739,712 claim for management fees and sinking fund charges on the developer's car parks that were accessorised to its penthouse and allowed the developer's RM432,853.86 counterclaim in respect of the same; (e) dismissed the developer's claim to refund of utility charges it had paid in respect of parcels it owned in Block F; and (f) allowed the MC's claims for vacant possession and for rent in respect of the developer's car park management office's occupation of the MC's common property between August 2008 and April 2013.

Held, unanimously dismissing Appeal No 530, allowing the MC's appeal in respect of Suits 510 and 516 in Appeal No 2155, dismissing the developer's appeals in respect of Suits 510 and 516 in Appeal No 2149 but allowing its appeal in respect of Suit 125:

(1) Appeal No 530 was dismissed as the subject-matter of the appeal had become academic since Messrs Ramli Yusuff & Co was no longer acting for the developer (see paras 24 & 78).

(2) The MC had locus standi to sue the developer for the period before its incorporation. Section 28(2) of the Strata Management Act 2013 vested in the MC all rights, powers and remedies of the JMB. Consequently, the MC had the locus to sue the developer for the return of the monies which were due to the JMB before the MC's incorporation. The trial judge erred in holding that the MC had no locus to sue for the monies prior to its incorporation on 8 April 2009 (see paras 47 & 78).

(3) There was no reason to depart from the trial judge's finding that there was no contractual relationship between the MC and the developer to pay the latter RM20,000 per month as management fees. Therefore, the developer had to return the fees it had collected to the MC. Furthermore, s 26 of the Building and Common Property (Maintenance and Management) Act 2007 prohibited the developer from acting as management agent of 3TS by virtue of being both the developer of the project and the parcel owner of Block F. It was not disputed that the developer had purported to act as property manager of 3TS from 3 August 2007 until 15 August 2012. Since it was illegal for the developer to have acted in that capacity, the developer was not entitled to the management fees it had collected and had to return it to the MC (see paras 49–53 & 56).

(4) The MC was not precluded from claiming the management fees and sinking fund charges for the car park parcels owned by the developer and which were accessorised to the developer's penthouse in Block F. This was because the developer had rented out the car parks as a business to generate income for itself. Such usage of the car park parcels was

independent of the penthouse and were not used or intended to be used in conjunction with the penthouse. As such, the car parks did not fall within the definition of 'accessory parcel' under s 4 of the Strata Titles Act 1985 ('the STA'). Consequently, the charging of maintenance fees and sinking fund charges with respect to the said car park parcels was not prohibited by ss 34(2) and 69 of the STA. The trial judge had wrongly interpreted and applied those sections to the factual matrix of the case. It followed that the trial judge's decision to allow the developer's counterclaim for the refund of RM432,853.86 as management fees and sinking fund charges in respect of the said car park parcels also had to be set aside (see paras 63–64 & 66).

(5) The trial judge was correct in dismissing the developer's claim for refund of the utility charges for the chiller in Block F since these were self-imposed charges that the developer had paid for its own property and there was no provision or agreement requiring the MC to pay those charges (see paras 67–71).

(6) With regard to the developer's operating of a car park management office on the common property belonging to the MC, the latter's RM139,200 claim for rental at the rate of RM2,400 per month from August 2008 to April 2013 could not be sustained as there was no evidence of any tenancy agreement on those terms between the parties. The MC had premised its claim solely on the existence of a tenancy agreement, but since there was none the claim had to be disallowed. The trial judge erred in allowing the claim despite finding that there was no oral or written tenancy agreement between the parties (see paras 73–77).

[Bahasa Malaysia summary

Ketiga-tiga rayuan di sini antara 3 Two Square Sdn Bhd ('pihak pemaju') dan syarikat pengurusan ('MC') pembangunan komersial yang dikenali sebagai 3 Two Square ('3TS') bermula dari keputusan Mahkamah Tinggi dalam tiga penyatuan saman sivil antara pihak-pihak, iaitu, 'Suit 510', 'Suit 516' dan 'Suit 125'. Setelah penyiapan pembangunan 3TS, pemaju menyelenggara dan mengurus 3TS sehingga Badan Pengurusan Bersama ('JMB') untuk kompleks pembangunan ditubuhkan pada 2 Ogos 2008. Lanjutan itu, MC mengambil alih penyelenggaraan dan pengurusan kompleks dari JMB pada 8 April 2009. Pada bulan Julai 2012, MC menghentikan peranan yang dilantik sendiri oleh pemaju sebagai ejen pengurusan 3TS yang mana ia dibayar RM20,000 sebulan sejak 2 Ogos 2008. Pemaju memiliki 13 lot kedai di 3TS, semua lot pejabat di Menara Korporat Block F dan kesemua tempat letak kereta di 3TS yang telah diakses ke unit *penthouse* yang dimilikinya di Blok F. Pada setiap masa yang material, pemaju menjalankan perniagaan tempat letak kereta di 3TS dan pejabat pengurusan tempat letak kenderaannya telah merangkumi kawasan umum yang dimiliki oleh MC. Setelah mengambil alih penyelenggaraan dan pengurusan 3TS, MC memfailkan tiga tuntutan terhadap pemaju. Dalam Suit

510, MC memohon pengembalian semula sejumlah RM1.2 juta fi pengurusan yang dibayar kepada pemaju pada kadar RM20,000 sebulan untuk tahun 2008-2012. Dalam Suit 516, MC memohon pembayaran sebanyak RM1,739,712 sebagai fi pengurusan dan caj dana terikat untuk tempat letak kereta yang dimiliki oleh pemaju yang telah diakses ke unit *penthouse* miliknya. Dalam menjawab tuntutan tersebut, pemaju membuat tuntutan balas pengembalian wang sebanyak RM432,853.86 sebagai caj penyelenggaraan dan dana terikat untuk petak tempat letak kereta tersebut. Pemaju juga memohon pengembalian caj utiliti (untuk *chiller*) yang telah dibayarnya pada petak yang dimilikinya di Blok F. Dalam Suit 125, MC menyaman pemaju untuk milikan kosong dan sewa (termasuk sewa berganda) berkaitan dengan pejabat perniagaan tempat letak kereta pemaju yang telah merangkumi kawasan umum MC. Hakim perbicaraan: (a) menolak permohonan pemaju untuk membatalkan kelayakan peguam MC daripada bertindak lebih lanjut bagi MC dalam prosiding (rayuan terhadap keputusan ini adalah tertakluk kepada Rayuan No 530 di sini); (b) mendapati bahawa pemaju telah melantik dirinya secara tidak sah sebagai ejen pengurusan 3TS untuk memungut caj pengurusan dan dana terikat; (c) memutuskan bahawa MC tidak berhak menyaman pemaju bagi pengembalian semula fi pengurusan yang telah dipungutnya sebelum tarikh penubuhan MC pada 8 April 2009; (d) menolak tuntutan MC sebanyak RM1,739,712 untuk fi pengurusan dan caj dana terikat bagi tempat letak kereta pemaju yang telah diakses ke *penthouse* dan membenarkan tuntutan balas sebanyak RM432,853.86 oleh pemaju berkenaan dengan perkara yang sama; (e) menolak tuntutan pemaju bagi pengembalian semula caj utiliti yang telah dibayar berkaitan dengan petak yang dimilikinya di Blok F; dan (f) membenarkan tuntutan MC untuk milikan kosong dan untuk sewa berkaitan dengan pejabat pengurusan tempat letak kereta pemaju yang merangkumi kawasan umum milik MC antara Ogos 2008 dan April 2013.

Diputuskan, dengan sebulat suara menolak Rayuan No 530, membenarkan rayuan MC berkenaan dengan Saman 510 dan 516 dalam Rayuan No 2155, menolak rayuan pemaju berkenaan dengan Saman 510 dan 516 dalam Rayuan No 2149 tetapi membenarkan rayuannya berkenaan dengan Suit 125:

(1) Rayuan No 530 ditolak kerana perkara utama bagi rayuan tersebut telah menjadi akademik oleh kerana Tetuan Ramli Yusuff & Co tidak lagi bertindak bagi pihak pemaju (lihat perenggan 24 & 78).

(2) MC mempunyai locus standi untuk menyaman pemaju selama tempoh masa sebelum penubuhannya. Seksyen 28(2) Akta Pengurusan Strata 2013 memberikan kepada MC kesemua hak, kuasa dan remedi JMB. Akibatnya, MC mempunyai locus untuk menyaman pemaju atas pengembalian semula wang yang terhutang oleh JMB sebelum penubuhan MC. Hakim perbicaraan telah terkhilaf apabila memutuskan bahawa MC tidak mempunyai locus untuk menyaman bagi wang

tersebut sebelum penubuhannya pada 8 April 2009 (lihat perenggan 47 & 78).

(3) Tidak ada alasan untuk keluar daripada dapatan hakim perbicaraan bahawa tidak ada hubungan kontrak antara MC dan pemaju bagi membayar RM20,000 tersebut sebulan sebagai fi pengurusan. Oleh itu, pemaju harus mengembalikan fi yang telah dipungutnya kepada MC. Selanjutnya, s 26 Akta Bangunan dan Harta Bersama (Penyelenggaraan dan Pengurusan) 2007 melarang pemaju bertindak sebagai ejen pengurusan 3TS kerana menjadi pemaju projek dan pemilik kotak Blok F. Ianya tidak dipertikaikan bahawa pemaju tela dengan sengaja bertindak sebagai pengurus hartanah 3TS dari 3 Ogos 2007 hingga 15 Ogos 2012. Oleh kerana ianya tidak sah bagi pemaju bertindak dalam kapasiti tersebut, pemaju tidak berhak atas fi pengurusan yang telah dipungutnya dan harus mengembalikannya semula kepada MC (lihat perenggan 49–53 & 56).

(4) MC tidak dihalang bagi menuntut fi pengurusan dan caj dana terikat bagi petak tempat letak kereta milik pemaju dan yang telah diakses ke *penthouse* milik pemaju di Blok F. Ini kerana pemaju telah menyewa tempat letak kereta sebagai perniagaan bagi menjana pendapatan untuknya sendiri. Penggunaan petak tempat letak kenderaan sedemikian tidak bergantungan kepada *penthouse* dan tidak digunakan atau dimaksudkan untuk digunakan bersama dengan *penthouse*. Oleh itu, tempat letak kereta tidak termasuk dalam definisi 'petak aksesori' di bawah s 4 Akta Hakmilik Strata 1985 ('AHS'). Oleh itu, pengenaan fi penyelenggaraan dan caj dana terikat berkaitan dengan petak tempat letak kereta tersebut tidak dilarang oleh ss 34(2) dan 69 AHS. Hakim perbicaraan telah terkhilaf dalam menafsirkan dan menggunapakai seksyen tersebut pada matriks fakta kes. Oleh itu, keputusan hakim perbicaraan untuk membenarkan tuntutan balas pemaju bagi pengembalian semula wang sebanyak RM432,853.86 sebagai fi pengurusan dan caj dana terikat untuk petak tempat letak kereta tersebut juga harus diketepikan (lihat perenggan 63–64 & 66)

(5) Hakim perbicaraan telah dengan tepat dalam menolak tuntutan pemaju untuk mengembalikan semula caj utiliti bagi *chiller* di Blok F kerana ianya adalah caj yang dikenakan sendiri yang telah dibayar oleh pemaju untuk hartanya sendiri dan tidak ada peruntukan atau perjanjian yang memerlukan MC untuk membayar caj tersebut (lihat perenggan 67–71).

(6) Berkenaan dengan operasi pemaju bagi pejabat pengurusan tempat letak kenderaan atas harta bersama milik MC, tuntutan sewa RM139,200 pada kadar RM2,400 sebulan dari Ogos 2008 hingga April 2013 tidak dapat dipertahankan kerana tidak ada bukti wujudnya perjanjian penyewaan terhadap terma-terma tersebut antara pihak-pihak. MC mengemukakan tuntutannya semata-mata atas wujudnya perjanjian

penyewaan, tetapi oleh kerana tidak ada maka tuntutan tersebut ditolak. Hakim perbicaraan telah terkhilaf dalam membenarkan tuntutan tersebut walaupun mendapati bahawa tidak ada perjanjian penyewaan secara lisan atau bertulis antara pihak-pihak (lihat perenggan 73–77).]

Cases referred to

Commercial Bank of Australia, Re (1893) 19 VLR 333, SC (refd)
Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under the Strata Titles Act 1985) [2019] MLJU 187; [2019] 2 CLJ 592, HC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara and another appeal [2020] 4 MLJ 93; [2019] 1 LNS 894, CA (refd)
Lee Ing Chin v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Legislation referred to

Building and Common Property (Maintenance and Management) Act 2007 (repealed by Strata Management Act 2013) ss 2, 25
Strata Management Act 2013 ss 3, 7, 7(1), 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 28(2), 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 46(1), 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, Parts IV, V
Strata Titles Act 1985 ss 4, 34(2), 36, 39, 69, Part VII

Appeal from: Suit Nos 22NCVC-510–07 of 2013, 22NCVC-125–03 of 2014, 22NCVC-516–07 of 2013 (High Court, Shah Alam)

Oommen Kurien (Celine Chelladurai, Jee Hock Hua and Tan Wei Li with him) (Tho, Hock & Chwan) for the appellant.
David Samuel (LS Leonard and Savreena Kaur with him) (Chambers of Firdaus) for the respondent.

Azizah Nawawi JCA:

INTRODUCTION

[1] There are three appeals before us:

(a) Appeal No B-02(IM)(NCVC)-530–03 of 2017;

(b) Appeal No B-02(NCVC)(W)-2149–10 of 2017; and

(c) Appeal No B-02(NCVC)(W)-2155–10 of 2017.

[2] Appeal No B-02(IM)(NCVC)-530–03 of 2017 (Appeal 530) is 3 Two Square Sdn Bhd's (defendant in the High Court) appeal against the decision of the learned High Court judge dated 15 February 2017, dismissing the defendant's application to recuse Messrs Ramli Yusoff & Co from acting for the plaintiff in the proceedings.

[3] Appeal No B-02(NCVC)(W)-2149–10 of 2017 (Appeal 2149) is 3 Two Square Sdn Bhd's appeal against part of the decision of the learned High Court judge dated 20 September 2017 in respect of the following consolidated suits:

(a) Suit No 22NCVC-510–07 (Suit 510) — against the order of the High Court judge to allow the claim by Perbadanan Pengurusan 3 Two Square (plaintiff in the High Court) for the return of the management fees from 8 April 2009, with 5% interest and RM100,000 costs;

(b) Suit No 22NCVC-516–07 of 2013 (Suit 516) — against the order of the High Court judge dismissing 3 Two Square Sdn Bhd's counterclaim of RM2,516,671.50 as overpayment of the utility charges to Perbadanan Pengurusan 3 Two Square; and

(c) Suit No NCVC-125–03 of 2014 (Suit 125) — against the order of the High Court judge allowing Perbadanan Pengurusan 3 Two Square's claim for vacant possession of the 'pejabat pengurusan parking' at the common property at Block A, the claim for outstanding rental of RMRM68,400 (at RM1,200 per month from 8/2008 to 5/2013) and double rental at RM2,400 per month from 6/2013 and continuing.

[4] Appeal No B-02(NCVC)(W)-2155–10 of 2017 (Appeal 2155) is Perbadanan Pengurusan 3 Two Square's appeal against part of the decision of the learned High Court judge dated 20 September 2017 in respect of the following consolidated suits:

(a) Suit 510 — against the order of the High Court judge limiting Perbadanan Pengurusan 3 Two Square's claim to recover the management fees from the defendant from the date of its incorporation on 8 April 2009; and

(b) Suit 516 — against the order of the High Court judge dismissing the Perbadanan Pengurusan 3 Two Square's claim for RM1,739,712 as management fees and sinking charges for the car parks owned by 3 Two Square Sdn Bhd and allowing 3 Two Square Sdn Bhd's counterclaim for the refund of RM143,971.62 and RM288,882.24 of paid fees and charges.

[5] Having considered the appeal records and the submissions of the parties, the unanimous decision of this court are as follows:

A (a) 3 Two Square Sdn Bhd's appeal in Appeal No 530 is dismissed;

(b) Perbadanan Pengurusan 3 Two Square's appeal in respect to Suit 510 and Suit 516 in Appeal No 2155 are allowed; and

B (c) 3 Two Square Sdn Bhd's appeal in respect to Suit 510 and Suit 516 in Appeal No 2149 are dismissed, but the appeal in respect of Suit 125 is allowed.

[6] For ease of reference, parties will be referred to as they were in the High
C Court.

THE SALIENT FACTS

[7] The plaintiff is a management corporation established pursuant to s 39 of the Strata Titles Act 1985 ('the STA'). The plaintiff was established on 8
D April 2009 to manage the sub-divided buildings and common property of the development known as 3 Two Square ('3TS') at No 2, Jalan 19/1, 46300 Petaling Jaya, Selangor Darul Ehsan. Section 39 of Part VII of STA was deleted vide s 38 of the Strata Titles (Amendment) Act 2013 and the provisions on the
E maintenance and management of buildings and common property were inserted into the Strata Management Act 2013 ('the SMA'). Section 3 of the SMA provides that the SMA shall be read and construed with the STA 1985 and the subsidiary legislation made under the STA in so far as they are not inconsistent with the provisions of the SMA or the regulations made under the
F SMA.

[8] 3TS is a commercial development comprising of five boutique retail shops & offices (Block A–Block E), as well as a Corporate Tower (Block F) known as 'The Crest' with two basement carparks. The Development consists
G of 267 parcels with an aggregate of 322,167 share units.

[9] The defendant is a private limited company incorporated in Malaysia and is the developer of 3TS. The defendant is the registered proprietor of 13 shop lots within 3TS, including all the parcels (17 Office lots) in the Corporate
H Tower (Block F), and all the car parks in 3TS which have been accessorised to one unit in Block F ('penthouse'). At all material times, the defendant was running a car park business in 3TS.

[10] The defendant has handed over vacant possession of 3TS on 3 August
I 2007, and until the formation of a joint management body, the defendant was obliged to maintain and manage 3TS.

[11] 3TS Joint Management Body ('JMB') was established on 2 August 2008 under the Building and Common Property (Maintenance and

Management) Act 2007 ('the BCPA'), when the defendant convened the first meeting of the JMB. The BCPA was repealed and replaced by the SMA on 1 June 2015. Section 38 of the SMA provides that a JMB or management corporation established under the repealed BCPA shall be deemed to have been established or elected under the SMA.

[12] The JMB took over the maintenance and management of 3TS from the defendant. With its incorporation, the plaintiff was to take over the maintenance and management of 3TS from the JMB upon the dissolution of the JMB.

[13] After the completion of 3TS, the defendant had full control of the plaintiff's account and after the plaintiff was incorporated, the defendant and/or the JMB of 3TS had tendered all services and management dealings and affairs to the plaintiff. The defendant had continued to deal with the accounts of 3TS.

[14] The defendant's service in the maintenance and management of 3TS was terminated by the plaintiff vide a letter dated 13 July 2012.

[15] Until the termination of the defendant's services as the managing agent on 13 July 2012, the defendant was paid RM20,000 per month since 2 August 2008. This payment did not include the operation cost of the defendant's management staff which includes benefits, allowances and other collateral expenses, which were paid separately.

[16] By a letter dated 17 July 2013, the plaintiff took the position that the accessory parcels shall have the same rate of maintenance and sinking fund charges as with other parcels within 3TS. Therefore, the plaintiff had issued to the defendant Invoice No 0003634 dated 17 July 2013 for the sum of RM445,536 as the maintenance and sinking fund charges for the period 1 August 2008 to 15 January 2010 and Invoice No 0003635 dated 17 July 2013 in the sum of RM1,294,176 for the period 16 January 2010 to 31 July 2012 for the car park maintenance.

[17] In Suit 510, the plaintiff was seeking the refund of management fees paid to the defendant in the sum of RM1.2m (management fees for the years 2008–2012 at RM240,000 per year or RM20,000 per month).

[18] In Suit 516, the plaintiff was seeking payment from the defendant in the sum of RM1,739,712 for management fees and sinking fund charges for the car parks owned by the defendant.

[19] In this regard, the defendant counterclaimed against the plaintiff for:

(a) the refund of monies paid by the defendant as 'Utility Charges' which were imposed on the parcels within the Corporate Tower (Block F) that belonged to the defendant; and

(b) the refund of the maintenance and sinking fund charges (RM432,853.86) that were imposed upon the defendant's car parks, which the defendant claimed to be accessory parcels to Parcel No 267, the penthouse.

OUR DECISION

[20] We are mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 the Court of Appeal held as follows:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. *But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.* (Emphasis added.)

[21] Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[22] Bearing in mind the above principles, we will now deal with the appeals of both the plaintiff and the defendant.

Appeal No 530

[23] Appeal No 530 is the defendant's appeal against the decision of the learned trial judge dismissing the defendant's application dated 16 January 2017, seeking to disqualify the plaintiff's solicitor, Messrs Ramli Yusuff & Co from further acting for the plaintiff in the proceedings.

[24] In respect of this appeal, we are of the considered opinion that the appeal has been rendered academic as Messrs Ramli Yusuff & Co is no longer acting for the plaintiff. We therefore dismissed this appeal.

Appeal Nos 2149 and 2155

[25] Since both Appeal Nos 2149 and 2155 are in respect of the three suits before the High Court, we will make our findings based on the respective suits in the High Court.

Suit 510

[26] In Suit 510, the plaintiff was seeking the refund of the management fees for the years 2008 to 2012 (at RM20,000 per month or RM240,000 per year), in the sum of RM1.2m and for various documents listed in annexure A of the statement of claim. In this appeal, the issue is limited to the return of the management fees.

[27] The plaintiff took the position that despite being paid RM20,000 per month as management services, the defendant also charged all operation cost of its management staff which includes benefits, allowances and other collateral expenses. From a comparison study, the plaintiff found that their appointed managing agent was charging only RM70,000 (per year) as management fees compared to the defendant's fees of RM240,000 per year.

[28] The defendant took the position that both the JMB and the plaintiff had expressly, or impliedly appointed the defendant as the managing agent of 3TS. The defendant also raised an issue that the plaintiff has no locus to claim against the defendant for all the fees and charges for the period 1988 to 21 August 2010, before the incorporation of the plaintiff.

[29] In the High Court, the learned judge has made the following finding of facts:

(a) there was no documentary evidence of the appointment of the defendant as the managing agent of 3TS;

(b) there was no evidence of any implied consent or approval for the defendant to act as the managing agent of 3TS;

(c) the appointment of the defendant as the managing agent of 3TS was not done by the Annual General Meeting ('AGM') of 3TS, but was done by the Committee Members themselves, who were aligned to the defendant, without any approval or endorsement by the AGM; and

(d) that between the year 2008 to 2012, the defendant had been collecting management fees of RM20,000 per month, with a total sum collected of RM1.2m.

[30] Despite the above findings by the learned judge that the defendant was not legally appointed as the managing agent to collect the management and sinking fees, the learned judge made a finding that the plaintiff had no locus standi to collect the management fees and charges or debts from the defendant for the period before its incorporation on 8 April 2009.

[31] Thereafter, the learned judge had dismissed the plaintiff's claim for a refund of the management fees and charges for the period before 8 April 2009 (which formed the plaintiff's appeal) and allowed the plaintiff's claim for the period after the incorporation of the plaintiff at the rate of RM20,000 per month with effect from 8 April 2009 (the defendant's appeal).

[32] Therefore there were two issues in Suit 510, namely the issue of locus standi of the plaintiff to claim for the refund of management fees before its incorporation and the substantive issue of whether the plaintiff can claim back the management fees from the defendant.

Issue of locus standi

[33] On the issue of locus standi, the plaintiff took the position that pursuant to sub-s 28(2) of Part IV of the SMA, the plaintiff was entitled to claim for the refund of the management fees prior to its incorporation, as the rights of its predecessor, the JMB to sue for the return of the management fees, had been vested in the plaintiff.

[34] However, the defendant took the position that the plaintiff falls under s 46 of Part V of the SMA, as vacant possession had been given and that the plaintiff was incorporated under the STA. There is no provision that is equivalent to s 28(2) of Part V of the SMA that entitled the plaintiff to claim for the return of the management fees prior to its incorporation.

[35] The issue then is whether it is s 28 of Part IV, or s 46 of Part V of the SMA, that is applicable to the factual matrix of this appeal and this calls for a statutory interpretation of the said provisions.

[36] In *Bennion on Statutory Interpretation* (5th Ed) Part XV (at p 713) explained the 'Functional Construction Rule':

> This Part describes the application of the rule, known as the functional construction rule that in construing an enactment the significance to be attached to each type of component of the Act containing the enactment must be assessed in conformity with its legislative function as a component of that type.

[37] The components fall into three groups:

(a) the operative components (sections, schedules, provisos and savings); A

(b) amendable descriptive components (long titles, preamble, purpose clause, recitals, short titles and examples); and

(c) unamendable descriptive components (chapter number, date of passing, enacting formula, headings, sidenotes, format and punctuation). B

[38] For the purpose of this appeal, since we are looking at s 28 of Part IV and s 46 of Part V of the SMA, we are looking at the functions of the unamendable descriptive component of the format or the layout of an Act. The SMA is divided into 'Parts', and the reason for dividing an Act into parts was given by Justice Holroyd in *Re Commercial Bank of Australia* (1893) 19 VLR 333, at p 375: C

> *When an Act is divided and cut into parts or heads, prima facie it is, we think, to be presumed that those heads were intended to indicate a certain group of clauses as relating to a particular object … The object is prima facie to enable everybody who reads to discriminate as to what clauses relate to such and such subject matter.* It must be perfectly clear that a clause introduced into a part of the Act relating to one subject matter is meant to relate to other subject matters in another part of the Act before we can hold that it does so. (Emphasis added.) D E

[39] Section 28 of the SMA falls under Part IV 'STRATA MANAGEMENT BEFORE EXISTENCE OF MANAGEMENT CORPORATION'. Part IV consists of ss 7 to 45. The subject matters covered by this Part IV is laid out in s 7(1), which reads: F

> 7 Application of this Part
>
> (1) Subject to Part V, this Part shall apply to a development area where before or after the commencement of this Act —
>
> (a) vacant possession of a parcel in the building or land intended for subdivision into parcels has been delivered by the developer to a purchaser; and G
>
> (b) at the time of delivery of vacant possession of the parcel, the management corporation has not come into existence. H

[40] On the other hand, s 46 of the SMA falls under Part V 'STRATA MANAGEMENT AFTER EXISTENCE OF MANAGEMENT CORPORATION'. Part V encompasses ss 46 to 85 of the SMA. The subject matters covered by this Part V is laid out in s 46(1), which reads: I

> 46 Application of this Part
>
> (1) This Part shall apply to a development area, where before or after the commencement of this Act —

A (a) vacant possession of a parcel in a building or land intended for subdivision into parcels or in a subdivided building or land has been delivered by the developer to the purchaser; and

(b) the management corporation has come into existence under the provisions of the Strata Titles Act 1985.

B

[41] Therefore, the distinction between Part IV and Part V is that Part IV applies to development area where vacant possession was delivered when management corporation has not come into existence, whereas Part V applies to development area where vacant possession was delivered when management C corporation has come into existence. In other words, Part IV of the SMA relates to strata management before the existence of a management corporation, that is from the developer to a JMB, and to a management corporation, whereas under Part V, it is for strata management after the existence of a management D corporation, where the developer deals directly with the management corporation, without a JMB.

[42] This can be seen from s 9 of the SMA which provides that during the developer's management period, the developer shall be responsible to maintain E and manage the building. From the developer's management period, s 15 of the SMA provides that once a JMB is established, the developer is required to hand over to the JMB the monies remaining in the maintenance account and the sinking fund account and various other matters. Section 27 of the SMA then provides that the JMB shall dissolved to give way to a management F corporation.

[43] On the factual matrix of this case, vacant possession of 3TS was given by the defendant/developer on 3 August 2007. The JMB of 3TS was established on 2 August 2008 and the plaintiff was only incorporated on 8 April 2009. G Thus, when vacant possession was given by the defendant, the plaintiff as the management corporation has not come into existence, and the plaintiff took over upon the dissolution of the JMB. Therefore, the factual matrix of this case falls within Part IV of the SMA, and s 28 is applicable to the plaintiff.

H **[44]** Section 27 of the SMA provides that the JMB shall dissolve three months from the date of the first AGM of the management corporation. The JMB shall then transfer all balance of monies in the maintenance account and sinking fund account to the management corporation, together with the related documents, by-laws, audited accounts, all assets and liabilities and all I related records.

[45] Where the balances of monies were not transferred to the management corporation under s 27, the same shall vest in the management corporation pursuant to s 28, which reads:

28 Balances not transferred shall vest in management corporation —

(1) If any balance of moneys in the maintenance account and in the sinking fund account has not been transferred by the joint management body under paragraph 27(2)(a), the moneys shall vest in the management corporation on the date of the expiry of the period specified in subsection 27(2).

(2) Any right, power or remedy granted to, or any liability imposed on, the joint management body under this Part in respect of the development area, including Charges, contribution to the sinking fund, and any other assets of maintenance account and the sinking fund account, shall vest in the management corporation on the date of the expiry of the period specified in subsection 27(2), and the management corporation shall have the same right, power, remedy or liability as if it had at all times been a right, power, remedy or liability of the management corporation, including those rights in respect of any legal proceedings or applications to any authority by or against the joint management body pending immediately before the date of the expiry of the period specified in subsection 27(2).

(3) Any judgment or award of any arbitral or other tribunal obtained by the joint management body in respect of the development area, including the Charges, contribution to the sinking fund and any other assets of the maintenance account and the sinking fund account, and not fully satisfied before the expiry of the period specified in subsection 27(2), shall be enforceable by the management corporation.

[46] We are of the considered opinion that under sub-s 28(2) of the SMA, any right, power or remedy granted to, or any liability imposed on the JMB, including the contribution to the sinking fund, and any other assets of maintenance account and the sinking fund account, shall vest in the plaintiff and the plaintiff shall have the same right, power, remedy or liability, including those rights in respect of any legal proceedings or applications to any authority by or against the JMB pending immediately before the date of the expiry of the period specified in sub-s 27(2).

[47] Therefore sub-s 28(2) of the SMA vests in the plaintiff all rights, powers and remedies of the JMB and consequently, the plaintiff has the locus to sue the defendant for the return of the monies due to the JMB before the plaintiff's incorporation. As such, we find that the learned judge had erred in law when he held that the plaintiff had no locus to sue for the monies prior to its incorporation on 8 June 2009.

Issue of whether the plaintiff can claim back the management fees from the defendant

[48] The learned judge had allowed the plaintiff's claim for the refund of the management fees from the defendant because there was no binding and enforceable contract that allowed the defendant to collect fees as the managing agent of 3TS. The learned judge found that since there was no binding agreement between the plaintiff and the defendant for the defendant to be paid RM20,000 per month as its fees for managing 3TS, the learned judge had ordered the refund of the management fees from the date of the plaintiff's incorporation on 8 April 2009, until the termination of the defendant as the managing agent in 2012.

[49] We have no reason to depart from the learned judge's finding of fact that there was no contractual relationship between the plaintiff and the defendant to pay the defendant the sum of RM20,000 as management fees, and therefore the defendant had to return the management fees to the plaintiff. This covered the period from 8 April 2009 to 15 August 2012.

[50] However at the same time, we are of the considered opinion that pursuant to s 26 of the BCPA, the defendant is prohibited from acting as the managing agent of 3TS, as the defendant was the developer of the building and the parcel owner of Block F. The BCPA is relevant to the plaintiff's claim for the refund of the management fees for the period between 2 August 2008 to 15 August 2012.

[51] Section 26 of the BCPA reads:

> 26 Independence of managing agent.
>
> (1) A person shall not be appointed as a managing agent if the person has a professional or pecuniary interest in any building or land intended for subdivision into parcels.
>
> (2) A person is regarded as having a professional or pecuniary interest in any building or land if —
>
> (a) he has been responsible for the design or *construction* of the building;
>
> (b) he or any of his nominees, officers or employees has *any material interest in the building* or land or any part of the building or land;
>
> (c) *he is a partner or is in the employment of a person who has any material interest in the building or land or any part of the building or land; or*
>
> (d) *he or his family holds any interest in the building or land or part of the building or land whether directly, as a trustee or otherwise.* (Emphasis added.)

[52] It is not in dispute that the defendant was the property manager of 3TS from 3 August 2007 until 15 August 2012, which encompassed the developer, JMB and management corporation period (see para 4 of the defendant's executive summary).

[53] Therefore since the defendant was the developer of 3TS and the parcel owner of Block F of 3TS, the defendant is prohibited by s 26 of BCPA from being the property manager or managing agent of 3TS.

[54] However, the defendant took the position that it was not a managing agent within the ambit of the BCPA, as s 2 of the BCPA provides that a managing agent is defined as a person appointed by the Commissioner of Buildings under s 25. Since the defendant was not appointed by the Commissioner of Buildings, the defendant was not acting as a managing agent under BCPA, but rather had acted as the manager of 3TS, dealing with the daily administration of 3TS on behalf of the JMB and subsequently, the plaintiff, outside the purview of the BCPA.

[55] With regard to the defendant's contention that it was acting as a managing agent outside the purview of the BCPA, this court in the case of *Ekuiti Setegap Sdn Bhd v Plaza 393 Management Corp (established under the Strata Titles Act 1985)* [2019] MLJU 187; [2019] 2 CLJ 592 has held that the parties cannot contract out from the provisions of the legislations. Since the provisions on managing agent had been provided for by the BCPA, then the parties are statutorily bound by the provisions of the BCPA.

[56] In the circumstances, we are of the considered opinion that when the defendant had acted as the property manager of 3TS from 2 August 2008 until 15 August 2012, the said appointment was illegal pursuant to section 26 of the BPCA. As the defendant's appointment was illegal by operation of the law, the defendant was not entitled to the management fees and the management fees must be returned to the plaintiff.

Suit 516

[57] In Suit 516, the plaintiff claimed for the shortfall of management fees and sinking fund charges for the car park owned by the defendant in Block F. The JMB had resolved that the management fees and sinking fund for the car park was RM0.20 per sqft from 2 August 2008 until 15 January 2010. From this date (15 January 2010), the plaintiff had resolved that the said charge would be RM0.30 per sqft. However, the defendant had only been paying RM0.05 per square feet. Hence, the plaintiff sued the defendant to recover the additional sum of RM1,739,712 for management fees and sinking fund charges for the said car parks at the two levels of the basement.

[58] On the other hand, the defendant had counterclaimed for the refund of maintenance fees and sinking fund charges in the sum of RM432,853.86 (RM143,971.62 + RM288,822.24) that were imposed on the defendant's car parks, which the defendant claimed to be the accessory parcels to the penthouse.

[59] However, the learned judge had dismissed plaintiff's claim, premised on ss 34(2) and 69 of the STA, that the plaintiff cannot levy additional charges on the defendant for the car park, which is an accessory to the defendant's penthouse. In para [44] of the judgement, the learned judge held that:

> [44] Considering the provisions of sections 34(2) and 69 of the STA which expressly prohibit any accessory parcel or any share or interest therein from being dealt with independently of the parcel, I concur with the contention that the plaintiff's action in charging maintenance and sinking fund charges, on the basis of square footage (sq. ft.) in respect of defendant's car parks is clearly prohibited in law as such action by the plaintiff amounts to treating the defendant's accessory parcels and its interest therein independently of the parcel to which it was made appurtenant.

[60] The relevant provisions, ss 34(2) and 69 of the STA read as follows:

> 34 Rights of proprietor in his parcel and common property
>
> ...
>
> No rights in an accessory parcel shall be dealt with or disposed of independently of the parcel to which such accessory parcel has been made appurtenant.
>
> 69 No dealing in accessory parcel independent of a parcel
>
> No accessory parcel or any share or interests therein shall be dealt with independently of the parcel to which such accessory parcel has been made appurtenant as shown on the approved strata plan.

[61] Hence, the issue is whether the defendant's car park serves as an accessory parcel to the defendant's penthouse in Block F. Under s 4 of the STA, accessory parcel means a parcel shown in a strata plan as an accessory parcel which is used or intended to be used in conjunction with a parcel. Therefore the word 'accessory' simply means that the usage of the accessory car park is attached to, connected or dependent on and/or used or intended to be used with the main parcel, the penthouse. It is not independent on its own.

[62] In the present appeal, the 'accessory parcel' are the car parks at the two levels of basement of Block F, which according to the defendant is an accessory parcel which is used or intended to be used in conjunction with the penthouse.

[63] It is not in dispute that the defendant is renting out the car park parcels and that these car park parcels are being utilised for commercial purposes, a car

park business, to generate an income to the defendant. The said car parks were used for the car park business, which is independent of the penthouse. Thus, all the said car parks cannot be said to be used in conjunction with the penthouse. Therefore, the usage of these car park parcels were not used or intended to be used in conjunction with the penthouse. As such, the car parks do not fall within the definition of 'accessory parcel' under s 4 of the STA. Consequently, the charging of the maintenance fees and sinking fund charges are not prohibited by ss 34(2) and 69 of the STA (see *Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara and another appeal* [2020] 4 MLJ 93; [2019] 1 LNS 894).

[64] In the premise, there is no legal prohibition for the plaintiff to claim for the management fees and sinking fund charges for the car park owned by the defendant. We therefore find that the learned trial judge fell into error in his interpretation of the application of ss 34(2) and 36 of the STA to the factual matrix of the case.

The defendant's counterclaim

[65] In their counterclaim in Suit 516, the defendant had claimed for the following prayers:

(a) the refund of the maintenance fees and sinking fund charges for the car parks for the sum of RM143,971.62 and RM288,882.24; and

(b) the refund of utility charges that was imposed on the defendant's corporate tower, Block F.

[66] With regard to the refund of the maintenance fees and sinking fund charges for the car parks, in view of our findings above that the car park was not an accessory to the penthouse, the plaintiff was entitled to charge the management fees and the sinking fund charges for the said car parks. In the premise, the decision of the learned judge to refund the sum of RM143,971.62 and RM288,882.24 of management fees and sinking fund charges to the defendant must be set aside.

[67] With regard to the issue of the utility charges of Block F, the learned Judge had dismissed the defendant's claim for refund of the utility charges on the basis that the charges were incurred by the defendant in respect of the property owned by the defendant for which there is no provision or agreement for the plaintiff to pay the utility charges.

[68] It is not in dispute that the units in Block A to Block E (seven floors) are owned by various parcel owners, whereas Block F belonged to the defendant exclusively. Block F consists of 16 floors and was rented out by the defendant to

various tenants, and the tenants were charged for the centralised air conditioning in the tenancy agreements.

[69] Block F is the only block that has a chiller and cooling tower ('chiller'), which was for the centralised air conditioning system. None of the other blocks A to E were equipped with the centralised air conditioning. All the parcels in Block A to E had to fit their own air conditions for their respective units.

[70] The utility charges paid by the defendant were RM0.30 cents above the RM0.20 cents (per square foot) paid by the other proprietors. This amount (RM0.50) was imposed and paid by the defendant when they acted as the managing agent of the property. At the AGM, the maintenance was increased to RM0.30 cents and defendant paid RM0.60 cents. This extra payment for maintenance fees and sinking fund charges was for the centralised air conditioning, the chiller which was exclusive to Block F, owned by the defendant. In fact the defendant only stopped paying the additional RM0.30 per square foot when the chiller was rewired whereby a separate meter was installed for Block F in November 2013.

[71] Therefore, we are of the considered opinion that since the extra charges were self-imposed by the defendant for the specific purpose of the chiller, we agree with the learned judge's finding that the defendant must pay for the utility charges for the chiller.

[72] On the issue of illegality in respect of the claim premised on square foot instead of share unit and the imposition of the two charges, we are of the opinion that the defendant has failed to raise the issue of illegality of such charges in their counterclaim, as the counter claim was based only on over payment by the defendant to the plaintiff in respect of the car park and the utility charges for the chillers. Added to that, the said utility charges were imposed by the defendant when they acted as the managing agent of 3TS. Therefore, the defendant should be estopped from raising the issue of illegality. Added to that, it would be unreasonable and unequitable if the defendant was not paying extra for the chiller which was for their exclusive use. Ultimately, it would be unequitable for the other proprietors to pay for the defendant's chiller.

Suit 125

[73] In this suit, the plaintiff had sued the defendant for vacant possession, arrears of rental of RM139,200 as at 31 May 2013, double rental at the rate of RM4,500 a month from 1 June 2013 until vacant possession, of the defendant's parking business office, which was situated within the common

property at Block A of 3TS. Vacant possession of the office space had since been delivered to the plaintiff by the defendant in May 2013.

[74] The learned judge found that it is not in dispute that the defendant's car park management office was situated within the common property, which belonged to the plaintiff at Block A. It is also not in dispute that the defendant had been occupying this office space since 2008 and had been running their car park business operations from this office, without paying any rental or contribution to the plaintiff. Added to that, it was only in mid 2012 that the plaintiff became aware that the car park office space was a common property.

[75] The plaintiff's claim for the rental of the office space was based on an alleged oral tenancy agreement, and the plaintiff was claiming the sum of RM2,400 from August 2008 to April 2013, for the total sum of RM139,200. However, from the minutes of meeting dated 7 March 2012, the plaintiff had only proposed to charge RM2,400 for the said office space. This amount was decided in 2012, not in 2008. In fact, the plaintiff's only cause of action in Suit 125 was premised on a breach of the alleged oral agreement in 2008, whereby the defendant had purportedly agreed to pay RM2,400 per month as rental since August 2008.

[76] In his judgment, the learned judge made the following findings:

> [80] P has proved their entitlement to be paid for the Car Park Office ('CPO') which is common property and unlawfully occupied and used by D without paying rental. D was therefore, liable to pay rental for the use and occupation of P.
>
> [81] However, *there was no tenancy agreement, whether express or implied, on the rate and other terms*. There can, however, be no doubt that D has to pay rental for the space that was not part of the property in Block F that it owned. (Emphasis added.)

[77] Since the learned judge has made a finding of fact that there was no oral or written tenancy agreement which formed the basis of the rental claim of RM2,400 per month since August 2008, we are of the considered opinion that this appeal should be allowed. We agree with the defendant that the plaintiff's pleaded case is based solely on the alleged tenancy agreement. However, the learned judge had made a finding of fact that there was no written/oral agreement in respect of the office space. Therefore, the plaintiff's claim is unsustainable and the trial judge erred in allowing the plaintiff's claim. The appeal by the defendant, *except for the order of vacant possession*, is hereby allowed and the order of the learned judge on this is set aside.

A CONCLUSION

[78] Premised on our reasons above, we make the following conclusions:

(a) Appeal 530 is dismissed as the subject matter is already academic;

B (b) with regard to Appeal Nos 2149 and 2155, on the issue of locus, we find that the plaintiff has the locus to sue for the period before its incorporation;

(c) with regard to Appeal No 2149, we allow the plaintiff's appeal and substitute paragraph 1 of the order of the High Court dated 20 September 2017 in Suit 510 with para 12(a) of the statement of claim of the said suit. The defendant's appeal is dismissed;

C

(d) with regard to Suit 125, we allow the defendant's appeal and set aside the order of the High Court dated 20 September 2017, except on vacant possession; and

D

(e) with regard to Appeal No 2155, we allow the plaintiff's appeal and dismiss the defendant's appeal. The order of the High Court dated 20 September 2017 in Suit 516 is set aside and judgment is entered in favour of the plaintiff in terms of para 11(a) with interest at 5% on the judgment sum from the date of filing of the writ to the date of settlement.

E

[79] On the issue of costs, we awarded the plaintiff costs of RM20,000 for Appeal No 530, RM150,000 for Appeal No 2155 and RM100,000 for Appeal No 2149. The defendant is awarded costs of RM50,000 for Appeal No 215.

F

Order accordingly.

G Reported by Ashok Kumar

H

I